EXECUTORY DEVISES IN ILLINOIS.

THE Supreme Court of Illinois disposes of a large number of cases each year. It apparently decides annually somewhere from 500 to 600 cases. Promptness in the decision of cases is a well-recognized and highly appreciated virtue of the court. Its dispatch of business in times past has been the more remarkable, from the fact that until within three years the court was a peripatetic body, holding successive terms at Ottawa, Springfield, and Mount Vernon. There is small reason for wonder, then, that the court should occasionally, in the pressure of work, have fallen into errors and inconsistencies. It is, nevertheless, unfortunate that the law, in important and fundamental branches, should become obscured and confused through errors of the court. It is in the hope of helping to clear up such errors, and to restore order in an important matter where, as it seems to me, confusion now reigns, that I contribute this article.

Upon the important subject of executory testamentary dispositions, the decisions of our Supreme Court appear to me most confused, inconsistent with each other, and contrary to well-established legal principles. The validity of an executory devise in fee limited to take effect upon the happening of a specified event, in defeasance of a prior devise in fee, certainly ought not to be doubtful. Devises of this character are perhaps the most common and well-recognized kind of executory devise. The books fairly swarm with examples of them. Yet in our state the validity of such executory devises is most questionable, as I now propose to show.

In the case of Wolfer *v.* Hemmer,[1] the court declares adherence to the doctrine that an executory devise limited after a prior devise of a fee with full power of alienation is void because inconsistent with the prior estate and absolute power of disposition. Professor Gray's well-known criticism of this doctrine[2] shows how it originated, through a misconception of an early English case, in the case of Ide *v.* Ide,[3] and how this error, thus

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[1] 144 Ill. 554.

[2] Gray's Restraints on Alienation (2d ed.), secs. 68–70 and 74, b, c, d, and e.

[3] 5 Mass. 500.

originated, was given a wide vogue by Chancellor Kent's promulgation of it in his commentaries and decisions. It would seem that our court was justified by authority in adopting the doctrine, erroneous though it be in its origin and upon principle. Aside from the doctrine just referred to, the case seems, by inference at least, to hold that, in the absence of express power of alienation in the prior devisee in fee, the executory devise over would have been valid.

In the case of Ewing *v.* Barnes,[1] the testator had devised land to Edwin Albert Ewing, to have and to hold to him "and to his heirs and assigns forever." By another clause of his will, the testator provided that, "in case of the death of Edwin Albert Ewing without heirs of his body, all the property bequeathed and devised to him in this will" should go to and vest in, "upon his death without issue," A and B. The court held that, the will having devised the premises to Edwin Albert Ewing in fee, the devise over to A and B, "being clearly inconsistent with the devise in fee," could not be sustained. The court refer to the case of Wolfer *v.* Hemmer and quote 4 Kent's Commentaries, p. 270, as follows: "If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over the property which, he, dying without heirs, should leave, or without selling, or devising the same, in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will. A valid executory devise cannot subsist under an absolute power of disposition in the first taker."

With all deference, the court quite misses the point of the passage quoted. The important words are: "if there be an absolute power of disposition (alienation) *given by the will to the first taker.*" The whole doctrine rests upon the power of alienation given by the will itself. In the case under discussion, the will gave no power of alienation whatever to Edwin Albert Ewing; consequently, the language above quoted was entirely inapplicable. The will seems clearly to present the familiar case of a prior devise in fee, with a subsequent devise over upon the death of the first taker "without heirs of his body."[2] If those words referred

[1] 156 Ill. 61.

[2] By Illinois Statutes, Ill. R. S., ch. 30, sec. 6, estates tail are converted into a life

to a failure of issue at the decease of the first taker, the executory devise over to A and B was indubitably good. If, on the other hand, the words imported a general failure of issue, — that is, a failure at any time at or after the death of the first taker, then the devise over was clearly bad, not because repugnant to the prior gift, but because it was limited to take effect upon an event too remote, and was consequently obnoxious to the rule against perpetuities.[1]

The case of Silva *v.* Hopkinson[2] was a case identical in principle with the preceding case. The testator gave an estate in fee to his two daughters with limitations over in case of their death without issue. The court say: "they (the daughters) take an unconditional fee, and no executory devise can, in such case, exist."

In the subsequent case of Glover *v.* Condell,[3] the court appeared to open its eyes to the errors into which it had fallen in Ewing *v.* Barnes and Silva *v.* Hopkinson. The case involved the consideration of a testamentary gift of personal estate limited to take effect, in defeasance of a prior absolute gift to testator's son, in the event of the son's death without living heirs of his body. The case was evidently well argued, and the decision of the court is, in the main, well considered and valuable. Upon the language of the will, the court construes death without heirs of the body to import a definite failure of issue, and hence holds the gift over is not too remote. The court then says, discussing executory devises, "A gift over upon a definite failure of issue does not alter the construction of the preceding limitation, but engrafts upon it an executory devise to operate upon the happening of the event specified. (11 Am. & Eng. Ency. of Law, p. 924.) As applied to land, an executory devise is 'such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.' (2 Washburn on Real Prop. 5th ed. marg. p. 341.) One species of executory devise, as applied to lands, is 'where a fee simple is devised to one, but is to determine upon some future

estate in the first taker with a fee in remainder in the first person who would inherit at common law *per formam doni;* consequently the gift over could not in any case be construed as a remainder after an estate tail. Summers *v.* Smith, 127 Ill. 645.

[1] The Illinois Supreme Court leans very strongly towards a construction of devises on failure of issues, as referring to a definite failure of issue. Summers *v.* Smith, 127 Ill. 645; Glover *v.* Condell, 163 Ill. 566; Strain *v.* Sweeny, 163 Ill. 603; Smith *v.* Kimball, 153 Ill. 368.

[2] 158 Ill. 386.

[3] 163 Ill. 566.

event, and the estate thereupon to go over to another.' (Id. p. 344.) Or, stated more generally, one species of executory devise relative to real estate is 'where the devisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency.' (4 Kent's Com. marg. p. 268.) Limitations over upon the death of the first taker without issue are construed as executory devises on definite failure of issue after an estate in fee simple. (2 Jarman on Wills — R. & T.'s 5th Am. ed. p. 485.) Thus, a devise to A and his heirs, with a gift to B, in case A dies without issue surviving at the time of his death, gives B an executory devise. (Am. & Eng. Ency. of Law, p. 920, and cases in note 1.)"

The court then points out that substantially the same rules apply to executory bequests of personalty as to executory devises, and finally the court holds the gift over to be valid as an executory bequest. The court takes pains expressly to overrule Ewing *v.* Barnes and Silva *v.* Hopkinson. The court says: "This court has held in a number of cases that although a fee cannot be limited upon a fee by deed, yet it can be so limited by will by way of executory devise (citing Ackless *v.* Seekright, Breese, 76; Siegwald *v.* Siegwald, 37 Ill. 430, and other cases). *The case of Ewing* v. *Barnes*, 156 Ill. 61, *so far as it holds to the contrary, is overruled.* The language used in Silva *v.* Hopkinson, 158 Ill. 386, should be construed as applicable only to the facts of that case, and not as contravening the doctrine of Siegwald *v.* Siegwald, *supra*, and the other cases of a like character above referred to." In the case of Strain *v.* Sweeny,[1] the language just quoted is quoted with approval.

It was to be expected the cases of Glover *v.* Condell and Strain *v.* Sweeny had put an end to the heresies of the court in the earlier cases above criticised. But, amazingly enough, we find the court in the recent case of Lambe *v.* Drayton,[2] returning to its abandoned errors. In that case the testator devised his real estate to his wife, "her heirs and assigns," to have and to hold the said real estate to his said wife during her lifetime. He also gave his wife all his personal estate, and then provided that his executors should divide whatever of the real and personal estate was left at the time of the wife's death, equally among his three children or their legal heirs. The court, by a process of reasoning (which seems hardly satisfactory), relying upon the principle which rejects

[1] 163 Ill. 603.

[2] 182 Ill. 110.

the habendum of a deed when inconsistent with the premises, and upon our statute providing that grants or devises of real estate without words of inheritance shall be deemed to pass a fee simple if a less estate be not limited by express words or "by construction or operation of law," arrives at the conclusion that the original devise to the wife is in fee simple. The court then considers the devise to the children. The court says: "It is clear that, inasmuch as the widow took a fee simple estate by the first clause, the estate over sought to be given to the children by the third clause was void as being inconsistent with the gift in the first clause. The devise of an estate in fee carries with it the power of alienation; and 'when the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment among certain specified persons or classes, an estate over is void, as being inconsistent with the first gift.' (Wolfer *v.* Hemmer, *supra.*)"

The court, after quoting the passage from Kent above quoted (page 596, *supra*), proceeds: "So, here, the remainder over to the children, attempted to be given by the third clause of the will, was void, because, by the first clause, the preceding fee had been given to the widow, Mrs. Drayton; and as the fee simple title, which had been given to her, included and involved the absolute power of disposition, the remainder in the third clause was void by way of executory devise. The limitation in the third clause is inconsistent with the power of disposition necessarily implied in the devise granted in the first clause."

It may be urged that the words, "what is left at my (testator's) wife's death," would contain an absolute power of alienation in the first taker, and hence would bring the case within the principle of Wolfer *v.* Hemmer. Such a contention would seem to be entirely sound on the authority of the cases of Saeger *v.* Bode,[1] *In re* Estate of Cashman,[2] and of 4 Kent Comm. p. 270, so often quoted by the court. But the court expressly negatives this view, saying, "it is true that the will of Robert J. Drayton did not expressly confer upon Mrs. Drayton, the first taker, the power of selling or otherwise disposing of the estate as she might see fit." And the court bases its decision upon the theory that "such power (of alienation) was involved in the fee simple title granted to her" (the wife). The court cite Wolfer *v.* Hemmer, but not Ewing *v.* Barnes, Silva *v.* Hopkinson, or Glover *v.* Condell.

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[1] 181 Ill. 514.

[2] 134 Ill. 88.

I confess I am utterly unable to account for this decision. If the result reached by the court was correct, as seems probable, on the theory that the will gave the wife a fee with power of alienation (implied by the gift over of what was left at her death), certainly nothing can be said in defence of the reasoning of the court. This is all the more extraordinary, since the opinion is by the same learned judge who laid down the law correctly in Glover *v.* Condell. The court's opinion is based upon the theory that the prior devise of a fee necessarily implies full power of alienation, and hence is inconsistent with, and repugnant to, the executory devise over. This view seems plainly indefensible. Professor Gray has shown how conditional limitations of all sorts were at first held destructible, like contingent remainders, and how the great case of Pells *v.* Brown,[1] decided in 1620, established the principle, never since then questioned, that an executory devise is indestructible by alienation or other act of the first taker.[2] The court could have learned the law equally well from Kent's Commentaries, Fearne on Remainders, or any of the standard works on real property, or, for that matter, from the American and English Encyclopædia of Law. Thus we find in Kent's Commentaries, vol. 4, p. 270: "Nor can an executory devise or bequest be prevented or destroyed by any alteration whatsoever, in the estate out of which, or subsequently to which, it is limited. The executory interest is wholly exempted from the power of the first devisee or taker." The learned chancellor, a few lines before, in pointing out the differences between executory devises and remainders, had said: "A fee may be limited (by executory devise) after a fee, as in the case of devise of land to B in fee, and if he dies without issue or before the age of twenty-one, then to C in fee." We find in Fearne on Remainders, p. 418, "it is a rule that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which it is limited."[3] Page 421, "That executory devises or bequests, in chattels, are equally secure as in real estates against the disposition of the first devisees or legatees of the preceding or limited interest therein, appears, in respect to chattels real, by Manning and Lampett's cases above noticed; in both of which it was resolved, that after

[1] Cro. Jac. 590.

[2] Gray on Perpetuities, secs. 142 *et seq.*, and 159. The law was established the same way as to executory bequests of chattels real as early as 1609 by Manning's case, 8 Co. 94 b.

[3] The case Fearne gives in illustration of his statement is Pells *v.* Brown, in which, as Fearne points out, the first limitation was in fee.

the executor had assented to the first devise, it lies not in the power of the first devisee to bar him who has the future devise; for he cannot transfer more to another than he has himself," etc., etc. Washburn, Real Property (4th ed. vol. 2, p. 698) reads, quoting Watkins on Conveyancing, "an executory devise cannot be barred or destroyed by any act of the person taking the preceding fee, or conveyance even by feoffment or matter of record." . . . "An executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate (fee) out of which or after which it is limited." In American and English Encyclopædia of Law, vol. 20, p. 963 (title Remainders), we find: "But since such interests (executory interests) arise independently of the preceding estate, they cannot be destroyed or prevented from taking effect by any alteration whatever in that estate, and hence the owner of a preceding estate in fee simple can do nothing to bar or affect the subsequent executory interest."[1]

The amount of authority of decided cases that might be collected in support of the foregoing principles would be limited only by the patience of the collector. I shall content myself with one case, Nightingale *v.* Burrell.[2] In that case we find the following language: "The essential difference in the quality of the estate, between a remainder and an executory devise, is, that the former may be barred at the pleasure of the tenant in tail, by a common recovery, or, in our state, by a conveyance by deed; but he who holds by force of an executory devise, has an estate above and beyond the power and control of the first taker, who cannot alienate or change it, or prevent its taking effect, according to the terms of the will, upon the happening of the contingency upon which it is limited."

The doctrine of Ewing *v.* Barnes and Lambe *v.* Drayton simply abolishes the most common and characteristic kind of executory devise, an executory devise limited to take effect in defeasance of a prior devise in fee, — a kind of devise universally recognized as perfectly valid, and so recognized even by Chancellor Kent, who stood sponsor for the American doctrine of the invalidity of executory devises after prior devises in fee with express or implied power of alienation.[3]

The cases thus far examined develop a confusion in the law which is certainly serious and fundamental. But I have by no means told the whole story. We have seen how, in Wolfer *v.*

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[1] See 2 Greenl. Cruise, Real Prop. 369; Tiedemann, Real Property, sec. 541.

[2] 15 Pick. 104.

[3] 4 Kent, Comm. 269; and see 2 Black. Comm. 172.

Hemmer,[1] the court announces adherence to the doctrine of the invalidity of an executory devise limited after a prior devise of the fee, with absolute power of alienation. Curiously enough we shall find a line of cases in which the court holds the exact opposite. In Friedman *v.* Steiner,[2] the testator devised "all the rest and residue" of his estate, real and personal, unto his wife, R, "and unto her heirs and assigns forever." "Provided, however, upon the express condition" . . . in case the said R, "after my decease shall die intestate and without leaving her surviving lawful issue; . . . that then and in such event all the rest and residue of my said estate so bequeathed and devised unto her" shall be converted into money and paid over to certain specified persons. The lower court held that R took a fee simple absolute in certain land which passed under the above provisions of the will, with full right to alienate in fee simple, and that the devise over operated only upon what property might remain undisposed of at her death. Upon appeal counsel for those claiming under the devise over insisted that R took only a life estate with a power of appointment by will. Counsel for R took the position that R had a fee simple absolute, and that the devise over was bad as repugnant to the fee simple given to R. The Supreme Court held that the lower court and both counsel were wrong; that R took a "fee determinable;" that she had power to convey or devise a fee simple absolute, and that the gift over upon her death intestate and without heirs of her body her surviving, was good, but would operate only upon undisposed-of property. The court professes to recognize the principle that "conditions that are repugnant to the estate to which they are annexed are absolutely void;" but holds that the estate granted was not a fee, because inheritance by collateral heirs was excluded (*sic*), and that therefore the gift over was not repugnant to the gift to R. The court does not discuss the nature of the estate given over in case of the death of R intestate and without issue. It refers to it as a "contingent or conditional limitation over." The court rely upon but a single authority, — Kent's Commentaries.

I cannot understand how the court arrived at the conclusion that R was given full power of alienation (except by will). The reasoning of the court on this point seems to proceed upon the fallacy above pointed out, into which the court fell in the case of Lambe *v.* Drayton. But if we assume that the court was correct in holding that R had full and absolute powers of alienation, it is

[1] 144 Ill. 554. [2] 107 Ill. 125.

impossible to reconcile the case with Wolfer *v.* Hemmer. Both cases were cases of a prior devise in fee with a devise in fee over to take effect upon the death of the first taker leaving no issue her surviving, and in both cases the first taker was given full and absolute powers of alienation; yet in the one case (Friedman *v.* Steiner) the devise over was held good, while in the other (Wolfer *v.* Hemmer) it was held bad. The court in Wolfer *v.* Hemmer make no mention of Friedmann *v.* Steiner, and it might be supposed that the later case overruled the earlier one, *sub silentio.* But no! in the recent case of Koeffler *v.* Koeffler,[1] we find the case of Friedman *v.* Steiner followed and approved to the fullest extent. The case of Koeffler *v.* Koeffler was a case of a bequest of real and personal property to a son in fee with a bequest over in case the son should die under the age of twenty-five, or over that age, leaving no issue him surviving, *with full and express powers of alienation in the son* on reaching twenty-five. The court, on the authority chiefly of Friedman *v.* Steiner, held that the gift to the son was a "fee determinable," and that the bequest over was perfectly valid, and carried the residue (both real and personal) not disposed of by the son. The case of Wolfer *v.* Hemmer was not mentioned. As the court does not profess to distinguish Wolfer *v.* Hemmer from Friedman *v.* Steiner, it is not easy to guess what distinction, if any, the court had in its mind, or how it would attempt to justify or reconcile these two lines of decisions. In the case of Friedman *v.* Steiner, and other cases following it, the court have a great deal to say about a "fee determinable." Apparently the court are of opinion that while an estate cannot be limited after a fee simple with powers of alienation by way of executory devise, this may be done where the prior estate is not a fee, but a fee *determinable.* Our court has held that a remainder in fee after a life estate, with full power of alienation, is good,[2] and the court in Friedman *v.* Steiner apparently thought the doctrine of repugnancy would apply only where the prior fee was a full fee simple. But the slightest examination shows the utter futility of the attempted distinction. The notion of a fee determinable is derived by the court straight from Kent's Commentaries. Kent[3] mentions two kinds of determinable fees. The first kind is where the happening of the contingency merely cuts short the fee simple estate, as "a limitation to a man and his

[1] 185 Ill. 261.

[2] Hamlin *v.* United States Express Co. 107 Ill. 443.

[3] 4 Comm. 9.

heirs so long as A shall have heirs of his body . . . or till the marriage of B, or so long as St. Paul's Church shall stand." The second kind is where the contingency which cuts short the prior fee also gives rise to a new estate. Kent expressly says, "*all fees liable to be defeated by an executory devise are determinable fees.*" It is perfectly evident that the kind of "determinable fee" the court had before it in Friedman *v.* Steiner, Koeffler *v.* Koeffler, and similar cases, was a fee "liable to be defeated by an executory devise." In Summers *v.* Smith,[1] the court expressly held the gift after a "fee determinable" of precisely the same character as that in Friedman *v.* Steiner, to be an executory devise, and sustained it as such. Consequently, by denominating the prior estate a "fee determinable," the court does not advance a step toward a correct decision of the case, which will depend upon the principles governing executory devises.

Friedman *v.* Steiner professes to proceed upon the authority of certain passages in Kent's Commentaries. But it requires only a casual examination of that famous work to develop the utter inconsistency of the case in question with the principles laid down in the great commentary. The very passage of the commentaries in which Kent states the doctrine of the repugnancy of an executory devise to a prior devise in fee, with full powers of alienation, illustrates that doctrine by the example of a devise of the identical kind found in Friedmann *v.* Steiner. He says in the passage heretofore quoted, "If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if *he dies possessed of the property without lawful issue*, the remainder over, . . . the remainder over is void" by way of executory devise, "because inconsistent with the absolute estate or power of disposition expressly given, or necessarily implied by the will," etc., etc.[2]

The law in Illinois can be summed up as follows: A devise to A and his heirs; but if A shall die leaving no issue him surviving then to B and his heirs. (a) The devise over to B is void as "clearly inconsistent" with the prior devise to A.[3] (b) The devise over is good as an executory devise.[4]

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[1] 127 Ill. 645.

[2] 4 Kent, Comm. 270.

[3] Ewing *v.* Barnes, 156 Ill. 61; Silva *v.* Hopkinson, 158 Ill. 386. And see Lambe *v.* Drayton, 182 Ill. 110.

[4] Ackless *v.* Seekright, Breese, 76; Wolfer *v.* Hemmer, 144 Ill. 554; Glover *v.* Condell, 163 Ill. 566; Strain *v.* Sweeny, 163 Ill. 603.

A devise to A and his heirs, with full power to alienate in fee simple absolute, and, in case A shall die leaving no issue him surviving, the undisposed of portion to B and his heirs. (a) The devise over is bad as repugnant to the prior devise.[1] (b) The prior devise to A is a "fee determinable," and the gift over to B is perfectly good, and carries the undisposed of residue.[2]

Louis M. Greeley.

CHICAGO, September 24, 1900.

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[1] Wolfer *v.* Hemmer, 144 Ill. 554; Burton *v.* Gagnon, 180 Ill. 345.

[2] Friedman *v.* Steiner, 107 Ill. 125; Summers *v.* Smith, 127 Ill. 645; Koeffler *v.* Koeffler, 185 Ill. 261.

Note the very close parallelism between the facts in Friedman *v.* Steiner, 107 Ill. 125, and Burton *v.* Gagnon, 180 Ill. 345, which were decided opposite ways.

Mr. Lessing Rosenthal, of the Chicago bar, has preceded me in criticism of many of the Illinois cases criticised in this article. 28 Chicago Legal News, p. 257.